

UNITED STATES DEPARTMENT OF AGRICULTURE
RURAL ELECTRIFICATION ADMINISTRATION
WASHINGTON 25, D. C.

December 13, 1951

POWER MEMORANDUM 334

Subject: Escape Clauses in Materials and Equipment Contracts

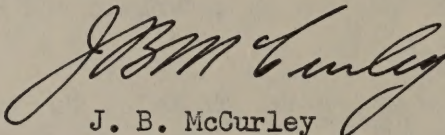
The purpose of this memorandum is to furnish information to borrowers and engineers regarding the exceptions some suppliers are taking to the provisions in standard REA material and equipment contract forms by insisting on the inclusion of escape clauses on proposals for certain items of equipment. The term "escape clause" as used in this memorandum includes clauses sometimes referred to as Suspension of Performance Clause, War Clause, National Emergency Clause or National Emergency Conditions Delay Clause. Generally, the use of such clauses has been limited to contracts for equipment such as turbine-generators, switchgear, and power transformers requiring long production time, equipment not produced in quantities or not of a "shelf" type.

The purpose of an escape clause is to provide special protection to the supplier by stating conditions and prices which will apply in the event the performance of the contract is delayed by any act of civil or military authority. It is our opinion that the supplier does not assume his fair share of the risk involved in doing business by insisting on an escape clause in a contract, but is in effect, transferring this risk to the purchaser even though the purchaser has no control over the occurrence of a delay or the resumption of performance of the contract. The policy expressed in the Defense Production Act of 1950 is that where defense regulations prevent performance of a contract neither party is liable to the other for breach of contract. In such cases, losses are permitted to remain where they fall instead of being imposed in large part or entirely on the purchasers, as these escape clauses attempt to do. Allis-Chalmers Manufacturing Company, General Electric Company, Westinghouse Electric Corporation, and other suppliers have requested REA approval of contracts containing special clauses. All of these clauses have objectionable features. Some suppliers have not insisted on the inclusion of escape clauses in contracts.

It is suggested that project engineers prepare plans and specifications in such a manner so as to induce competition and bidding from suppliers who do not demand such special protection. In some cases, requirements

can be met by the assembly of standard or "shelf" items of equipment. Careful attention given by project engineers to this matter can materially reduce the dependence of borrowers on suppliers who insist on escape clauses.

It is to the interest of all borrowers that the application of escape clauses be kept to a minimum. In cases involving the construction of all facilities of power-type borrowers and generation facilities of distribution-type borrowers, the Power Division will give consideration to the approval of other than the low bid where an escape clause is included in the low bid, if upon analysis by the project engineer and attorney and recommendation by the board of directors, it is determined to be in the best interests of the borrower to accept other than the low bid.



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